IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAUDIUS ATKINSON,	:	
	:	
Petitioner	:	CIVIL ACTION
	:	
v.	:	
	:	
KENNETH JOHN ELWOOD, District Director, et al.,	:	
	:	
	:	
Respondents	:	NO. 01-CIV-5462

MEMORANDUM

Petitioner Claudius Atkinson filed a Petition for Writ of Habeas Corpus to challenge the lawfulness of an immigration judge's final order for removal and decision that Mr. Atkinson is not eligible for a waiver of deportation pursuant to section 212(c) of the Immigration and Nationality Act ("INA"). In light of the reasoning in the recent Third Circuit decision, Ponnapula v. Ashcroft, 373 F.3d 480 (3d Cir. 2004), I find that Mr. Atkinson is not eligible for discretionary relief pursuant to former section 212(c), and I will deny his petition.

I. BACKGROUND

The procedural and factual history is set forth in Judge Caracappa's Report and Recommendation. The facts are as follows:

> Atkinson is an alien and citizen of Jamaica who came to the United States as a non-immigrant visitor in January 1983, and adjusted his status to lawful permanent resident on January 25, 1985. On December 16, 1991, following a jury trial, the Court of Common Pleas for Philadelphia County, Pennsylvania, convicted Atkinson of criminal conspiracy and possession of, with intent to distribute, a controlled substance. On the same day, Atkinson was sentenced to not less than six months nor more than twelve months imprisonment, to run concurrently with a second sentence of not less than eleven months nor more than twenty-three served on work release.

> On June 2, 1997, the Immigration and Naturalization Services ("INS") served a Notice to Appear on Atkinson, initiating removal proceedings. The Notice to Appear alleged that Atkinson was removable from the United States, pursuant to INA §§ 237(a)(2)(B)(i) and 237(a)(2)(A)(iii), as an alien convicted of an offense relating to a controlled substance and an aggravated felony, as defined in INA § 101(a)(43).
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> On March 30, 1998, the IJ ordered Atkinson removed, holding Atkinson ineligible for any form of removal relief, including a waiver of deportation under repealed INA § 212(c). Atkinson filed an appeal with the Board of Immigration Appeals ("BIA"), which affirmed the IJ's decision, without written opinion, on June 25, 2001. On July 23, 2001, Atkinson filed a Motion to Reconsider with the BIA basing his argument on INS v. St. Cyr, 533 U.S. 289 (2001).
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> On October 18, 2001, Atkinson was detained by the INS. On October 29, 2001 Atkinson filed the present Petition for Writ of *Habeas Corpus* and Stay of Removal. The Stay of Removal was granted on the same day by Judge Petrese Tucker, and on April 29, 2002, Atkinson was released from INS custody pending resolution of this petition. On July 12, 2002, the BIA denied Atkinson's Motion to Reconsider, holding that the Supreme Court's ruling in St. Cyr applied to aliens entering into plea agreements but did not apply to aliens who, like Atkinson, were convicted after a jury trial. In his *habeas* petition Atkinson challenges the IJ's order of removal and decision that Atkinson was ineligible for § 212(c) relief as contrary to the laws of the United States.

Report and Recommendation, Atkinson v. Elwood, No. 01-5462, at 1-3. Judge Caracappa found that the holding in St. Cyr did apply to Atkinson and that the repeal of section 212(c) was impermissibly retroactive. She therefore recommended that the court grant Atkinson's petition and that he be provided a section 212(c) hearing to determine whether he was eligible for a waiver. The case was reassigned from Judge Petrese Tucker to this court on August 17, 2004.

II. DISCUSSION

Former section 212(c) of the Immigration and Nationality Act ("INA") permitted deportable aliens to request discretionary relief from deportation if they had maintained an unrelinquished domicile for seven years in the United States. 8 U.S.C. § 1182(c) (repealed

1996). This included aliens subject to deportation based upon conviction of an aggravated felony if the term of imprisonment imposed was less than five years. Id.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.). Section 304(b) of IIRIRA repealed section 212(c) and replaced it with a new procedure for cancellation of removal. Under section 304(b), cancellation of removal is not available to an alien who has been convicted of an aggravated felony. 8 U.S.C. § 1229(b) (1996). In INS v. St. Cyr, 533 U.S. 289 (2001), the Supreme Court held that application of section 304(b) to aliens who pleaded guilty to an aggravated felony prior to the repeal of section 212(c) was impermissibly retroactive. Thus, according to the Court, relief under section 212(c) "remains available to aliens...whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) at the time of their plea under the law then in effect." Id. at 326.

At the time Atkinson filed his habeas petition, however, neither the Supreme Court nor the Third Circuit had addressed whether an alien who proceeded to trial and was subsequently convicted of an aggravated felony prior to the repeal of section 212(c) remained eligible for relief. Since that time, the Third Circuit decided this question in Ponnapula v. Ashcroft, 373 F.3d 480 (2004). In Ponnapula, the court held that aliens who turned down plea agreements and chose to go to trial "had a reliance interest in potential availability of 212(c) relief" and therefore, section 212(c)'s repeal was impermissibly retroactive as to this category of aliens. Id. at 494; cf. Swaby v. Ashcroft, 357 F.3d 156, 161-62 (2d Cir. 2004); Rankine v. Reno, 319 F.3d 93, 100 (2d Cir. 2003); Chambers v. Reno, 307 F.3d 284, 290-91 (4th Cir. 2002).

In rendering its decision, the Ponnapula court reviewed Supreme Court decisions regarding retroactivity of civil laws, and indicated that its "disagreement with the courts that have held that IIRIRA's repeal of § 212(c) relief is not impermissibly retroactive with respect to aliens who went to trial is that those courts have erected too high a barrier to triggering the presumption against retroactivity." Id. at 491. The court therefore concluded that a party challenging the retroactive application of a law need not show "actual reliance" on the prior state of the law, but merely "reasonable reliance."[1] Specifically, the court found that "[t]he likelihood that the party before the court did or did not in fact rely on the prior state of the law is not germane to the question of retroactivity" and that "courts are to concentrate on the group to whose conduct the statute is addressed...with a view to determining whether reliance was reasonable." Id. at 493. According to the Ponnapula court, aliens who rejected plea agreements had such reliance interest in the availability of section 212(c) relief. Id. at 494. The court reasoned:

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[1] In a recent case regarding the retroactive effect of IIRIRA, the Fourth Circuit took a different approach, finding that "reliance, in any form, is irrelevant to the retroactivity inquiry." Olatunji v. Ashcroft, 387 F.3d 383, 396 (4th Cir. 2004). The Olatunji court noted that "courts have historically asked simply whether the statute in question attached 'new legal consequences to events completed before its enactment,'" id. at 390 (citing Landgraf v. USI Film Products, 511 U.S. 244 (1994), and concluded therefore that the only question is whether "a statute, *in fact*, has a retroactive effect." Id. at 394. Specifically, the court relied on the holding in Hughes Aircraft v. United States ex rel. Schumer, 520 U.S. 939 (1997), to establish that the Supreme Court did not intend to impose a requirement of reliance in its decision in Landgraf. As the Olatunji court explained:

> [In Hughes,] the Court held that the elimination of certain defenses to *qui tam* suits under False Claims Act could not be applied retroactively to Hughes Aircraft. *And it so held without even a single word of discussion as to whether Hughes Aircraft--or, for that matter, similarly situated government contractors--had relied on the eliminated defense to its detriment....*[I]f reliance were indeed a requirement, the Court almost certainly would have addressed the question or at least remanded for a factual determination of whether Hughes Aircraft had or had not relied upon the prior statutory scheme.

Olatunji, 387 F.3d at 391. The Fourth Circuit's opinion is compelling. Nevertheless, the Third Circuit's decision in Ponnapula suggests that reasonable reliance is and should be considered when conducting a retroactivity analysis, and therefore, I will take Mr. Atkinson's reliance interest into account for purposes of deciding this case.

> Though St. Cyr concentrated on the many aliens who ultimately accepted plea agreements, it is not reasonable to believe that all aliens who rejected plea agreements thereby disclaimed any interest in § 212(c) relief; in fact, quite the contrary is true. There are many reasons to proceed to trial--the lack of a plea agreement that would ensure eligibility for § 212(c) relief, the hope of an acquittal, or the simple desire to exercise fundamental constitutional rights--but few if any of them are inconsistent with preserving a contingent interest in § 212(c) relief.
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> A case about aliens who accept plea agreements (i.e., St. Cyr) is relatively straightforward because the availability of § 212(c) relief was very likely a dominant factor in their decision. This case may seem harder because making the decision to go to trial is perhaps more complex and more nuanced, but we should not let that obscure the fact that former § 212(c) was one of a host of factors considered by aliens who elected that course--and per the Court's discussion in St. Cyr, a significant factor at that.
>
> To be sure, there are aliens who would appear to have had a very attenuated reliance interest in the availability of § 212(c) relief--for example, aliens charged with the most serious of crimes, carrying the longest prison sentences, who turned down unattractive plea agreements. Preserving eligibility for discretionary withholding of deportation was probably not foremost in such aliens' minds, for they had the slimmest chances to qualify for § 212(c) relief. But the fact that an interest may have been attenuated, however, has had little salience in the Supreme Court's analysis of other retroactivity questions...Attenuation of this kind generally does not render reliance unreasonable.

Id. 495-96.

The court's decision in Ponnapula was limited to those aliens who were offered a plea agreement, declined it, and went to trial. The court explicitly declined to decide whether the repeal of section 212(c) as it applies to aliens--like Mr. Atkinson--who proceeded to trial without an express plea offer is impermissibly retroactive. However, the court noted that "[b]ecause aliens [who did not receive a plea offer] had no opportunity to alter their course in the criminal justice system in reliance on the availability of § 212(c) relief, we highly doubt (though do not

explicitly hold, for the issue is not before us) that such aliens have a reliance interest that renders IIRIRA's repeal of former § 212(c) impermissibly retroactive as to them." Id. at 494.

In this case, the parties agree that Mr. Atkinson did not receive a formal plea offer in connection with the 1991 criminal charges and conviction. See Transcript of Argument, Dec. 6, 2004 (not yet available). The absence of a formal plea offer does not necessarily mean there were no plea negotiations, and if Mr. Atkinson had been aware that he would be ineligible for 212(c) relief if he proceeded to trial without a formal plea offer, he might have more vehemently challenged the criminal charges prior to invoking his right to a jury trial. Nevertheless, the Ponnapula court noted with approval the Seventh Circuit's opinion that "'it would border on the absurd' to argue that an alien would refrain from committing crimes *or would contest criminal charges more vigorously* if he knew that after he had been imprisoned and deported, a discretionary waiver of deportation would no longer be available to him." Ponnapula, 373 F.3d at 496 (quoting Lara-Ruiz v. INS, 241 F.3d 934, 945 (citations omitted) (emphasis added)). Because the Third Circuit has rejected as too attenuated the type of reliance that aliens in Mr. Atkinson's position may have had, I find that the repeal of section 212(c) as it applies to Mr. Atkinson is not impermissibly retroactive.

III. CONCLUSION

In light of foregoing analysis, I will deny Mr. Atkinson's petition for habeas corpus relief. An appropriate order follows.

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Respondents	:	NO. 01-5462

ORDER

AND NOW, this day of December, 2004, upon consideration Report and Recommendation of Linda K. Caracappa, United States Magistrate Judge, Respondent's objections thereto, supplemental briefs, and hearing of oral argument, it is hereby ordered that the Petition for Writ of Habeas Corpus is hereby DENIED.

This case is closed for statistical purposes.

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LAWRENCE F. STENGEL, J.